PP v. AHMAD SHAHBUDIN HUSSAIN

HIGH COURT MALAYA, ALOR SETAR
CHOO KAH SING JC
[CRIMINAL APPEAL NO: 42LB-22-07-2014]
12 JANUARY 2015

CRIMINAL LAW: *Penal Code – Section 436 – Mischief by fire – Destruction of properties belonging to political party – Allegation of – Contradiction in oral evidence of eye witnesses – Whether testimony of witnesses supported prosecution's case – Whether respondent had intention to cause destruction to building – Whether "Markas BN" could be construed as building – Whether ingredients of offence proved*

The accused ('respondent') was charged in the Sessions Court under s. 436 of the Penal Code ('PC') for committing a criminal act of mischief by fire causing the destruction of properties belonging to a political party. Among the prosecution witnesses were: (i) the complainant ('SP1'); (ii) SP4, SP5 and SP6, who were at the scene where the respondent was alleged to have committed the offence; and (iii) the investigating officer ('SP7'). SP4 and SP5 respectively testified that while they were on their way home, they witnessed a 'Markas BN' and some flags on fire. Both witnesses testified that they saw the respondent at the scene. However, they did not know who caused the fire. SP6 testified that while she was riding her motorcycle, she witnessed a 'pondok' on fire and the respondent was burning some flags. She also saw SP4 and SP5 at the scene and they were sitting at the road side. SP6 also testified that she asked the respondent why he was burning the flags and he answered 'saya nak bakar'. SP6 then left the scene and went to report the incident to SP1, who was the head of a political branch. During trial, SP6 confirmed that the 'pondok/markas' did not have a gate and could not be locked. Having found that there were contradictions in the oral evidence of SP4, SP5 and SP6, the trial court ruled that the prosecution failed to establish a *prima facie* case and acquitted the respondent without calling him to enter his defence. Dissatisfied, the prosecution appealed against the decision of the Sessions Court.

Held (dismissing appeal; affirming decision of the Sessions Court):

(1) The trial judge had scrutinised and considered the oral evidence of SP4 and SP5 and their evidence was weighed against the oral evidence of SP6. The credibility of the witnesses had been assessed and they were all truthful witnesses. However, there was no justifiable ground for the trial judge to accept the oral evidence of SP6 and reject the oral evidence of SP4 and SP5. The trial judge had also correctly observed that SP4 and SP5 were the prosecution's witnesses and their oral evidence was not

A challenged nor disputed. Hence, the evidence of SP4 and SP5 should not be disregarded. Further, the evidence of SP4 and SP5 did not corroborate the oral evidence of SP6 or supported the prosecution's case (*Wan Yurillhami Wan Yaacob & Anor v. PP*; dist). (para 20)

B **(2)** By virtue of s. 436 of the PC, the prosecution had to prove that the respondent had the intention to cause the destruction of the building or that he knew it to be likely that he would thereby cause such destruction by committing a mischief by fire. Intention is a matter of fact which in the nature of things could not be proved by direct evidence. It could only be proved by inference from the surrounding circumstances. On the C facts, the prosecution did not rely on any surrounding circumstances to make an inference on the respondent's intention to destruct the 'Markas BN/pondok'. The mere fact that the respondent was at the scene was not sufficient to make a conclusive inference of the respondent's intention to cause the destruction to the building. (paras 25 & 26)

D **(3)** The 'Markas BN/pondok' was already on fire before SP6 arrived. SP6 did not say that she saw the respondent burning the building. There was no other fact or surrounding circumstances from which one could have inferred the respondent's intention to cause the destruction of the 'Markas BN/pondok'. As such, an important element of the offence was E not proved. (para 25)

(4) The prosecution had to prove, *inter alia*, that the accused caused the destruction of some property or some change in such property or in the situation thereof. Where no eye-witnesses were produced to say that they could be said to have seen the accused demolishing a portion of the F wall built by the complainant, the charges would fail. Further the prosecution did not address the question of whether the subject matter, *ie*, the 'Markas BN' as per the charge could be construed as a building within the meaning of s. 436 of the PC. (paras 27 & 29)

G **(5)** The building allegedly destructed was referred to as a 'Markas BN'. In the English language, 'Markas' means 'camp'. SP6 described the building as 'pondok untuk buat Markas' and SP7 testified that the 'pondok' was used as a 'Markas Pilihanraya BN' at the material time. It was previously used by the respondent as a shed to sell 'goreng pisang'. It had no lock or fence and was open without a wall. It was also H used as a school bus stop. The 'Markas BN' could not be treated as a building within the meaning of the term used in s. 436 of the PC. Further, there was no evidence that the 'Markas BN' had ordinarily been used as, *inter alia*, a place of worship or for the administration of justice. (para 31)

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Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Bujjha and Ors v. State of UP 1985 Cri LJ 1829 ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Ng Hoong Kee v. PP [1966] 1 LNS 117 FC ***(refd)***
P'ng Hun Sun v. Dato' Yip Yee Foo [2013] 1 LNS 320 CA ***(refd)***
Periasamy Sinnappan v. PP [1996] 3 CLJ 187 CA ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Sabarudin Non v. PP & Other Appeals [2005] 1 CLJ 466 CA ***(refd)***
Sainal Abidin Mading v. PP [1999] 4 CLJ 215 CA ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 173(h)(iii)
Penal Code, s. 436

Other source(s) referred to:
Ratanlal & Dhirajlal's Law of Crimes – Bharat Law House: New Delhi, 1998, vol 2, pp 2139, 2158, 2159

For the appellant - Che Sharif Matt; M/s Taulan Rasul
For the prosecution - Sharifah Syazwani Syed Hussin; DPP

Reported by Kumitha Abd Majid

JUDGMENT

Choo Kah Sing JC:

Introduction

[1] This is an appeal filed by the Public Prosecutor against the decision of the Sessions Court Judge, Alor Setar dated 13 July 2014. The learned trial judge at the end of the prosecution's case found that the prosecution had failed to establish a *prima facie* case against the respondent. Therefore, the learned trial judge ruled that the respondent be acquitted without calling him to enter his defence in answer to a charge as follows:

> Bahawa kamu pada 24 April 2013 jam lebih kurang 11.40 pagi di hadapan Markas Barisan Nasional, Kampung Machang, Tanjung Putus di dalam Daerah Kuala Nerang, di dalam Negeri Kedah Darul Aman telah melakukan khianat dengan api iaitu menyebabkan kebakaran 15 batang bendera Barisan Nasional dengan maksud hendak menyebabkan kebinasaan Markas Barisan Nasional. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 436 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama.

Brief Facts

[2] The respondent was alleged to have committed a criminal act of mischief by fire causing the destruction of properties belonging to a political party on 24 April 2013. He was charged under s. 436 of the Penal Code. The

prosecution had called seven witnesses. Four of the prosecution witnesses were from the public; they were SP1, SP4, SP5 and SP6. SP1 was the complainant, whereas SP4, SP5 and SP6 were at the scene where the respondent was alleged to have committed the offence. SP2, SP3 and SP7 were the arresting officer, photographer and investigating officer respectively.

[3] The prosecution case centred on the oral evidence of SP4, SP5 and SP6.

[4] SP4 told the court that while he was on his way home on his motorcycle he saw a "Markas BN" and some flags were on fire at Kampung Machang. He stopped at the scene and saw the respondent and SP5.

[5] SP4 told the court that he did not know who caused the fire or who had burned the flags (see p. 37 appeal records). SP4 said he was at the scene for about ten minutes before he left for home.

[6] SP5 told the court that while he was on his way home after visiting a food stall, he saw a "Markas BN" on fire. He also saw some flags were burning. SP5 told the court that when he stopped at the scene, he saw only the respondent. SP5 told the court that he did not know what had caused the fire nor did he see who had caused the fire (see p. 41 appeal records). SP5 then left the scene after five minutes.

[7] SP6, another prosecution witness, told the court that while she was on her way to Kampung Machang on her motorcycle, she saw a "pondok" on fire. She then stopped at the scene and saw the accused burning some flags. She also saw SP4 and SP5 at the scene and they were sitting at the road side. She told the court that she asked the respondent why he was burning the flags, and the respondent answered that he wanted to burn (in Bahasa Malaysia "saya nak bakar" [see p. 44 appeal records]). SP6 also described the respondent as angry at that time. SP6 told the court that she was not sure what the respondent had used to burn the flags (see p. 45 appeal records). After that, SP6 went to SP1's house to inform SP1 about the incident. SP6 told the court that the "pondok" belonged to the respondent.

[8] In cross-examination, SP6 confirmed that the "pondok" was built by the respondent, and it was used as a place to sell "goreng pisang". SP6 also confirmed that the "pondok/markas" did not have a gate and could not be locked. She further confirmed that anyone could access the "pondok" as it was situated at the side of a road, and that it was also used as a school bus stop.

[9] SP6 agreed that she was the last person who arrived at the scene as SP4 and SP5 were already there with the respondent (see p. 49 appeal records). SP6 also agreed in cross-examination that the persons who ought to know better who had caused the fire at the "pondok" would be SP4 dan SP5.

[10] The learned trial judge in his judgment (see pp. 4-10 of the appeal records, in particular at p. 7) stated as follows: A

> Berdasarkan keterangan yang diberikan oleh SP4, SP5 and SP6 saya mendapati bahawa terdapat percanggahan yang amat ketara di antara keterangan SP6 dengan SP4 dan SP5. Menurut SP6 semasa beliau berhenti di pondok tersebut beliau nampak OKT sedang membakar bendera BN di dalam pondok tersebut. Sebaliknya SP4 dan SP5 yang telah berada disitu sebelum SP6 tiba di ternpat kejadian tersebut langsung tidak mengetahui siapakah yang telah mengakibatkan kebakaran tersebut. SP4 dan SP5 juga tidak nampak OKT membakar pondok Markas BN tersebut seperti yang didakwa oleh SP6. B
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> Jika benar OKT ialah orang yang telah membakar pondok tersebut seperti yang didakwa oleh SP6, adalah mustahil SP4 dan SP5 langsung tidak nampak perbuatan OKT tersebut memandangkan kedua-dua mereka sampai di tempat tersebut sebelum SP6 tiba di situ. Percanggahan di dalam keterangan SP4, SP5 dengan SP6 menunjukkan bahawa keterangan yang diberikan oleh saksi utama pihak pendakwaan khususnya SP6 adalah amat meragukan. C D

[11] At p. 8 of the appeal records, the learned trial judge stated:

> Di dalam kes ini tidak ada sebarang bukti bahawa SP4 dan SP5 tidak bercakap benar semasa mereka memberi keterangan di Mahkamah. Apakah lagi keterangan SP4 dan SP5 yang juga merupakan saksi pihak pendakwaan langsung tidak dicabar mahupun dipertikaikan oleh pihak pendakwaan. Justeru dalam keadaan keterangan SP4 dan SP5 tidak dipertikaikan dan dicabar, maka Mahkamah tidak boleh memilih untuk menerima keterangan SP6 dan menolak keterangan SP4 dan SP5. Percanggahan di dalam keterangan saksi-saksi utama pihak pendakwaan telah menimbulkan keraguan di dalam kes pihak pendakwaan. Justeru saya mendapati bahawa pihak pendakwaan telah gagal untuk membuktikan satu kes *prima facie* terhadap (OKT) memandangkan terdapatnya keraguan yang amat serius di dalam keterangan kes pendakwaan tersebut. E F

[12] Based on the above findings, the learned trial judge acquitted the respondent. G

The Appeal

[13] The crux of the appellant's appeal centred on the evidence given by SP6 during the prosecution's case. The appellant submitted that the prosecution at the close of prosecution's case had successfully proved a *prima facie* case against the respondent. H

[14] The appellant submitted that SP6 was the eye witness who saw the "pondok" on fire. SP6 also saw the respondent burning the flags. SP6 asked the respondent why he was burning the flags, and the respondent answered "saya nak bakar" ("I want to burn"). SP6 then left the scene and went to I

report the incident to SP1, who was the head of a political branch in Kampung Tanjung Putus. The appellant further submitted that the evidence of SP4 and SP5 confirmed that only the respondent was present at the scene; and that the respondent's close proximity with the burning of the flags was an important fact to relate him to the burning of the flags.

[15] The appellant submitted that the learned judge had made an error in his findings in accepting that there were contradictions on the oral evidence of SP4, SP5 and SP6. The appellant cited the case *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17; [2010] 1 MLJ 749, in particular at p. 762, para. 29, wherein the Federal Court stated:

> The difference in the evidence given by SP4, SP5 and SP6 of the marking of pills in my view only tends to show the level of observation exercised by a particular witness in examining the said exhibits. It is not unreasonable for two or more witnesses seeing the same object to give a different description ...

[16] The appellant cited the cases of *Sabarudin Non v. PP & Other Appeals* [2005] 1 CLJ 466; [2005] 4 MLJ 37 and *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301, and urged the court to accept the evidence of SP4, SP5 and SP6 individually and that the evidence were credible, consistent and corroborating each other, and even if there was inconsistency, it was normal as each of the witnesses has explained what had happened to an event or matter.

[17] Based on the above submission, the appellant urged this court to set aside the learned trial judge's decision and direct the respondent to enter his defence.

[18] The respondent's counsel submitted that SP4, SP5 and SP1 stated clearly that they did not know who caused the mischief of fire. He further submitted that SP6 was the last person who arrived at the scene among SP4, SP5 and SP6. He also submitted that the evidence of SP4, SP5 and SP6 were in contradiction. Based on these grounds, the prosecution had failed to prove a *prima facie* case. The respondent's counsel urged the court to dismiss the appellant's appeal.

The Court's Findings

[19] It is incumbent upon this court when exercising its appellate jurisdiction to be cautious and slow to disturb the findings of facts of a trial court unless such findings are not supported by the evidence or are against the weight of the evidence. It is equally important for this court to bear in mind that it ought not disturb the trial judge's finding on the credibility of witnesses, because a trial court is in a better position to assess their credibility. An appellate court is not in a position to assess the credibility of the witnesses (see *Sainal Abidin Mading v. PP* [1999] 4 CLJ 215; [1999] 4 MLJ 497; *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ

(Rep) 101; [1983] 2 MLJ 232; *Periasamy Sinnappan v. PP* [1996] 3 CLJ 187; [1996] 2 MLJ 557; *P'ng Hun Sun v. Dato' Yip Yee Foo* [2013] 1 LNS 320; [2013] 6 MLJ 523).

[20] In this instant case, the learned trial judge had scrutinised and considered the oral evidence of SP4 and SP5, and weighed the oral evidence of SP4 and SP5 against the oral evidence of SP6. The learned trial judge had assessed the credibility of the witnesses and had came to the conclusion that they were all truthful witnesses, and hence, there was no justifiable ground for him just to accept the oral evidence of SP6 and reject the oral evidence of SP4 and SP5. In addition, the learned trial judge had correctly observed that SP4 and SP5 were the prosecution's witnesses, and their oral evidence was not challenged nor disputed. Therefore, the oral evidence of SP4 and SP5 should not be disregarded. It is clear from the evidence of SP4, SP5 and SP6 that the evidence of SP4 and SP5 does not corroborate the oral evidence of SP6 or support the prosecution's case.

[21] The appellant cited the case of *Wan Yurillhami Wan Yaacob & Anor v. PP & Other Appeals* in support of the appeal and urged this court to accept all the oral evidence of SP4, SP5 and SP6. I find the case is inaptly cited here as the case referred to evidence of witnesses in relation to the markings of an exhibit (pills), where the witnesses each gave a different description of the same object. In this instant case, the witnesses SP4, SP5 and SP6 each gave evidence of what they saw at the scene and what they personally observed and perceived as happening at the scene. Though they were at the same place, they were describing what was happening at the scene as opposed to describing one specific object, such as in the case of *Wan Yurillhami Wan Yaacob & Anor v. PP & Other Appeals*.

[22] From the appeal records at p. 56, during cross-examination, SP7 told the court that SP6 told him that she was the first person who arrived at the scene before SP4 and SP5. In the oral evidence of SP6, she admitted that when she arrived at the scene SP4, SP5 and the respondent were already there (see p. 47 of appeal records). Clearly, there was contradiction in the oral evidence of SP7 and SP6.

[23] At the close of the prosecution's case, I find the learned trial judge had correctly directed himself and applied the right law – s. 173(h)(iii) of the CPC. The learned trial judge had also applied the correct legal principles governing the close of the prosecution's case. He had correctly relied on the case *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457. There is no reason for this court to disturb the findings of facts and law of the learned trial judge.

[24] I noticed that at the close of the prosecution's case, the learned prosecutor did not address the ingredients of the offence charged, and that the prosecution did not establish or prove all the ingredients of the offence charged (see prosecutor's submission at pp. 63-69 of the appeal records). It is fundamental that, at the close of the prosecution's case, the prosecution has

A to adduce credible evidence proving each ingredient of the offence, failing which the prosecution has not made out a *prima facie* case against the accused, and the trial court shall record an order of acquittal.

[25] In this instant case, the alleged offence was s. 436 of the Penal Code which reads as follows:

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> Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship, or for the administration of justice, or for the transaction of public affairs, or for education, or art, or for public use or ornament, or as a human
C dwelling, or as a place for the custody of property, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

[26] The most important element of this offence is the element of "intending to cause". The prosecution has to prove that the respondent had
D the intention to cause the destruction of the building or that he knew it to be likely that he would thereby cause such destruction by committing a mischief by fire (see *Ng Hoong Kee v. PP* [1966] 1 LNS 117; [1967] 1 MLJ 85). Intention is a matter of fact which in nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding
E circumstances (see *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] MLJ 237). The prosecution did not rely on any surrounding circumstances to make an inference on the intention of the respondent to destruct the "Markas BN/pondok". The mere fact that the respondent was at the scene could not in my opinion be sufficient to make a conclusive inference of the respondent's intention to cause the destruction of the building. The statement made by the
F respondent ("saya nak bakar" at p. 44 appeal records) was merely referring to the respondent's intention to burn the flags not the building. From the evidence, the "Markas BN/pondok" was already on fire before SP6 arrived. SP6 said she saw the respondent burning the flags; she did not say she saw the respondent burning the building. There was no other fact or surrounding
G circumstances from which one could have inferred the intention of the respondent to cause the destruction of the "Markas BN/pondok". On this score, an important element of the offence was not proven.

[27] The ingredients of the offence that the prosecution has to prove are as follows:

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(i) the accused caused the destruction of some property, or some change in such property or in the situation thereof;

(ii) that above act destroyed or diminished the value or utility of such property, or affected it injuriously;

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(iii) that the accused did as in (i) intending or knowingly that he was likely to cause loss or damage to the public or to any person;

(iv) that the causing of such damage or injury was wrongful;

(v) that the property injured consisted of a building; and

(vi) that such building was ordinarily used as a place of worship, or for the administration of justice, or for the transaction of public affairs, or for education, or art, or for public use or ornament, or as a human dwelling, or a place for the custody of property.

[28] Item (i) is an essential element of the *actus rea* of the offence, and it is said that "where no eye witnesses were produced to say that they could be said to have seen the accused demolishing a portion of the wall built by the complainant, the charges would fail" – *Bujjha and Ors v. State of UP* 1985 Cri LJ 1829 (all) (see "*Ratanlal & Dhirajlal's Law of Crimes – with List of Malaysian Cases*", Bharat Law House: New Delhi, 1998, vol. 2, at p. 2139).

[29] It is observed that the prosecution did not address the question whether the subject matter in this instant case, the "Markas BN" as per the charge, could be construed as a "building" within the meaning of s. 436 of the Penal Code.

[30] "Markas" in English language means "camp". The words "Markas" and "pondok" were used interchangeably throughout the trial. However, "pondok" in English language could mean "hut", "shed" or "shack". The *Cambridge Dictionaries Online* defines "camp" to mean: (i) a place where people stay in tents or other temporary structures; (ii) an area where people are kept temporarily for a particular reason (such as refugee camp); and (iii) a place where soldiers stay when they are training or fighting a war. In this instant case, the building allegedly destructed was referred to as a "Markas BN". According to *Ratanlal & Dhirajlal's Law of Crimes* (*supra*, at pp. 2158-59):

> 'Building' is not necessarily a finished structure. An unfinished house, of which the walls were built and finished, the roof unfinished, a considerable part of the flooring laid, and the internal walls and ceilings prepared ready for plastering was held to be a building. A structure made of straw and not of bricks and mortar may be considered a building if it has got the necessary furnishings needed for a building such as door bars, etc. *An ordinary thatched shed resting on bamboos or wooden or brick pillars having no doors, etc, cannot be treated as a building within the meaning of the term used in section 436* (emphasis added). Consequently when fire was caused to such a structure the accused could not be convicted under section 436 but as the bullocks therein died in consequence of the fire the accused could be convicted under section 435.

[31] In cross-examination, SP6 described the building as "pondok untuk buat Markas" and said that it was built by the respondent some time ago (see p. 47 of appeal records). It was previously used by the respondent as a shed to sell "goreng pisang". It had no lock or fence, it was open (without wall) and anyone could access to it. It was also used as a school bus stop. The pictures tendered as evidence by the prosecution (see pp. 73-74, A, B, C and D) depict a zinc roofed shed resting on a wooden pillars having no doors or

wall (see also the description given by SP7 at p. 53 of the appeal records – "... sebuah pondok kayu berukuran 8x5 kaki"). After having considered all these evidence, I am of the view that the "Markas BN" cannot be treated as a building within the meaning of the term used in s. 436 of the Penal Code. Further, there is no evidence that the "Markas BN" had ordinarily been used as place of worship, or for the administration of justice, or for the transaction of public affairs, or for education, or art, or for public use or ornament, or as a human dwelling, or a place for the custody of property. According to the oral evidence of SP7, the "pondok" was used as a "Markas Pilihanraya BN" at that material time (see p. 55 of the appeal records).

Decision

[32] After having considered the learned Deputy Public Prosecutor's and defence counsel's written submissions as well as the appeal records, and based on the above reasoning, I am of the considered view that the appeal has no merit. Hence, I dismiss this appeal by the Public Prosecutor and affirm the decision of the Session Court Judge.